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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

STEVEN KALISH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

WHETHER THE DOUBLE JEOPARDY CLAUSE, WHICH REQUIRED REVERSAL OF PETITIONER'S CONSPIRACY CONVICTIONS ON THE BASIS OF *AUTREFOIS ACQUIT*, SHOULD ALSO REQUIRE REVERSAL OF HIS SUBSTANTIVE CONVICTION OBTAINED IN THE SAME TRIAL WITH THE CONSTITUTIONALLY BARRED CONSPIRACIES.

(a) WHETHER RELITIGATION OF PETITIONER'S MEMBERSHIP IN THE CONSPIRACIES, HAVING BEEN PREVIOUSLY DETERMINED IN PETITIONER'S FAVOR SHOULD HAVE BEEN BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL SO THAT EVIDENCE IN SUPPORT OF SUCH ISSUES SHOULD NOT HAVE BEEN ADMISSIBLE IN HIS TRIAL ON THE SUBSTANTIVE CHARGE.

(b) WHETHER THE FIFTH CIRCUIT'S DOUBLE JEOPARDY RULE REQUIRING ALL CHARGES TO BE BROUGHT IN A SINGLE PROCEEDING WAS VIOLATED BY PETITIONER'S SUBSTANTIVE CONVICTION IN A SECOND TRIAL ALONG WITH CONSPIRACIES WHICH WERE CONSTITUTIONALLY BARRED BY HIS PREVIOUS ACQUITTAL.

2.

WHETHER THE FIFTH CIRCUIT HAS EMASCULATED THE MANDATE OF *ABNEY v. UNITED STATES*, 431 U.S. 651 (1977) BY SHIFTING THE RESPONSIBILITY OF DEALING WITH INTERLOCUTORY APPEALS TO AN UNREVIEWABLE DISTRICT COURT PROCEDURE.

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THE OPINION BELOW

The original opinion of the Court of Appeals for the Fifth Circuit was rendered on July 23, 1982 and is reported at ____F.2d____; Panel Rehearing and Rehearing En Banc were denied on September 22, 1982. A copy of the opinion is appended hereto.

JURISDICTION

Grounds on which jurisdiction of the Supreme Court is invoked:

A. The Court of Appeals for the Fifth Circuit rendered its opinion on July 23, 1982.

B. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on September 22, 1982.

C. The Supreme Court has jurisdiction herein by reason of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * * "

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STATEMENT OF THE CASE

The Panel Opinion from the Fifth Circuit correctly and succinctly states the case:

> "On December 10, 1979, a government joint task force seized a shrimp boat called the El Cobre, loaded with 40,000 pounds of marijuana, a few miles off the coast of Texas near Freeport. On December 19, 1979, the same joint task force seized an offshore supply boat called the Mr. Jake loaded with 100,000 pounds of marijuana as it was being unloaded at the Intracoastal Marina in Freeport.

"Appellant, Steven Kalish, was indicted in connection with both seizures. The El Cobre Indictment, filed January 11, 1980 charged Kalish and four co-defendants with one count of conspiracy to import marijuana, 21 U.S.C. § 963, and one count of conspiring to possess marijuana with intent to distribute, 21 U.S.C. § 846. The Mr. Jake indictment, filed January 18, 1980, named Kalish and thirty-six co-defendants in three counts: two counts charging violations of the same two conspiracy statutes charged in the El Cobre indictment, and a third count charging Kalish with the substantive offense of possession with intent to distribute, 21 U.S.C. § 841(a)(1).

"Kalish was tried on the El Cobre indictment in March 1980. A jury found Kalish not guilty of both conspiracy counts of that indictment.

"Prior to this April 1980 trial on the Mr. Jake indictment, Kalish filed a plea-in-bar, contending that his trial on the conspiracy counts of that indictment was barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. After a full hearing, the court denied Kalish's plea. Although Kalish immediately filed a notice of appeal from the trial court's ruling, see *Abney v. United States*, 431 U.S. 641, 97 S.Ct. 2034 (1977) the trial court refused to stay Kalish's trial pending appeal, expressly finding Kalish's double jeopardy claim to be 'frivolous'. *See United States v. Dunbar*, 611 F.2d 985 (5th Cir.) (en banc), cert. denied, 447 U.S. 926, 100 S.Ct. 3022 (1980). The court did grant Kalish's request to stay the trial pending his petition to this court for a writ of prohibition. This court denied the petition, and the trial commenced. The jury found Kalish guilty on all three counts of the Mr. Jake indictment. After judgment was entered on the verdict, Kalish filed his second notice of appeal."

Petitioner had also objected, at his second trial, to the introduction of evidence used by the government in his first trial to support the conspiracy charges, basing his objection both on the Double Jeopardy Clause and collateral estoppel.

On appeal the Court of Appeals for the Fifth Circuit held that the El Cobre indictment charged the same conspiracies as the Mr. Jake indictment stating:

> "We must conclude that the evidence in the record tends to show that Kalish was involved in a single, continuing conspiracy to import marijuana and to possess it with intent to distribute. . . . Therefore, Kalish's trial on the conspiracy counts of the Mr. Jake indictment was barred by the Double Jeopardy Clause."

Petitioner also contended that his conviction on the substantive count in the Mr. Jake case should be reversed because it was infected with the evidence introduced in support of the conspiracy, which evidence should have been barred, and because of the Fifth Circuit rule that all charges relating to a single conspiracy should be brought in one proceeding, i.e., the substantive charge should have been brought in the first trial, the El Cobre proceeding. In his Petition for Rehearing the Petitioner complained that the Fifth Circuit had abdicated its responsibility under *Abney v. United States, supra,* by relegating to the district court, in an unreviewable fashion, the responsibility of dealing with interlocutory double jeopardy appeals.

ARGUMENT AND AUTHORITY

QUESTION ONE RESTATED

WHETHER THE DOUBLE JEOPARDY CLAUSE, WHICH REQUIRED REVERSAL OF PETITIONER'S CONSPIRACY CONVICTIONS ON THE BASIS OF *AUTREFOIS ACQUIT*, SHOULD ALSO REQUIRE REVERSAL OF HIS SUBSTANTIVE CONVICTION OBTAINED IN THE SAME TRIAL WITH THE CONSTITUTIONALLY BARRED CONSPIRACIES.

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Petitioner's conviction for the substantive offense of possession with intent to distribute marijuana was based almost wholly on evidence which was admissible in the trial only because conspiracies were also charged. That is, hearsay acts and declarations of co-conspirators were admissible and used to support Petitioner's substantive

conviction whereas if only the substantive conviction were on trial such evidence would not be admissible. There was no direct evidence that Petitioner was ever in actual possession of the marijuana which was in the process of being off-loaded from the Mr. Jake. Rather, the government's theory was constructive possession, i.e. that Petitioner was a member of the group that conspired to import and to possess with intent to distribute the marijuana aboard the Mr. Jake. This evidence should have been precluded from the trial, either on a Double Jeopardy theory or by the Doctrine of Collateral Estoppel, the issue of Kalish's membership in the conspiracies having been favorably decided in Petitioner's behalf. Thus his conviction was infected by the conspiracy evidence. At the very least, the Fifth Circuit should have followed their own mandate from *United States v. Rodriguez,* 612 F.2d 906 (5th Cir. en banc 1980) in which Judge Brown wrote, in a slightly different context:

> " * * * We feel that the Supreme Court in action as well as words (footnote omitted) has recognized that the Double Jeopardy Clause imposes no limits on Congress's power to define the allowable unit of prosecution and punishment, *at so least so long as all charges are brought at a single proceeding* * * * *[O]ur holding that double jeopardy is not offended by these conspiracy charges brought in a single proceeding does not extend to the multiple prosecution areas, and the government would be well advised to bring all of its charges (relating to a single conspiracy) in a single proceeding." United States v. Rodriguez,* 612 F.2d at 924, 925 (emphasis added).

Thus, the government should have brought to trial in the same proceeding as the El Cobre conspiracies, the

substantive charge against Kalish for which he was convicted in the second trial. At the very least, his conviction of the substantive offense, infected by the costitutionally impermissible evidence, should be reversed and a new trial ordered.

QUESTION TWO RESTATED

WHETHER THE FIFTH CIRCUIT HAS EMASCULATED THE MANDATE OF *ABNEY v. UNITED STATES*, 431 U.S. 651 (1977) BY SHIFTING THE RESPONSIBILITY OF DEALING WITH INTERLOCUTORY APPEALS TO AN UNREVIEWABLE DISTRICT COURT PROCEDURE.

The Fifth Circuit has emasculated the Supreme Court's holding in *Abney v. United States, supra,* regarding the right of an individual to an interlocutory appeal of a nonfrivolous double jeopardy claim. In *Abney v. United States, supra,* the Supreme Court said:

> "We therefore hold that pretrial orders rejecting claims of former jeopardy, such as that presently before us, constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of [28 U.S.C.] Section 1291.[8]
>
> 8. Admittedly, our holding may encourage some defendants to engage in dilatory appeals as the Solicitor General fears. However, we believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the Courts of Appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy."

Thus the mandate of the Supreme Court was that the *Courts of Appeals* have the duty of determing whether a double jeopardy appeal is frivolous. The Fifth Circuit, however, first in *United States v. Dunbar*, 611 F.2d 985 (5th Cir. en banc 1980) and then in the instant cause as it interprets *Dunbar*, has abdicated that duty to an unreviewable finding by the trial court of frivolity. This rule is especially pertinent in the instant case because the district court should have been deprived of jurisdiction to try Petitioner until his double jeopardy claim was finally decided by the Court of Appeals. When the Court of Appeals ultimately decided his double jeopardy claim it found that it was not only non-frivolous, but meritorious and that his trial on the conspiracy counts violated the double jeopardy provision.

The Panel Opinion herein incorrectly concludes that the en banc Fifth Circuit decision in *United States v. Dunbar, supra,* makes the district court's finding of frivolity absolutely unreviewable except by writ of prohibition. The practical effect of this interpretation of *Dunbar* is to emasculate *Abney* for, if the district court were so inclined, as it apparently was in this case, no matter how strong and convincing the evidence of a double jeopardy claim might be, the district court could deny the plea-in-bar, find it to be frivolous, and delay entering the order until after the trial (as was done in this case) thus effectively undermining the double jeopardy protection of interlocutory appeal enunciated in *Abney*.

The panel recognized that the district court had clearly erred and that the Court of Appeals had not carefully scrutinized Appellant's Application for Writ of Prohibition. But even though the panel recognized this anomaly,

it retreated from a far more specious anomaly to hold that, though both the district court and the appellate court had erred, Appellant was entitled to no relief because a finding of frivolity by the district court was absolutely unreviewable:

> "We recognize that *Dunbar* makes the district court's finding of frivolousness unreviewable, unless this court intervenes 'by staying proceedings below pending appeal, F.R.A.P. 8, or by issuing a writ of mandamus or prohibition, 28 U.S.C.A. Sec. 1651.' 611 F.2d at 989. But to hold that the district court lacks jurisdiction because of an erroneous anomalous finding of frivolousness would create the prospect of 'protecting' double jeopardy rights by ordering yet a third trial.
>
> "This case demonstrates that the district court must adhere to the literal meaning of the term 'frivolous' and that this court must carefully scrutinize petitions for expedited relief from findings of frivolousness. In *Abney*, the Supreme Court recognized a statutory right to a pre-trial appeal largely because the rights conferred * * * by the double jeopardy clause would be significantly undermined if appellate review of the double jeopardy claims were postponed until after conviction and sentence * * * [The Clause] is a guarantee against being twice put to trial for the same offense. *Abney*, 431 U.S. at 660, 661. * * * The whole purpose of *Abney* is defeated when district courts proceed to trial because they do not believe the defendant's double jeopardy plea is sufficiently meritorious to warrant a stay. *Dunbar* was intended to prevent dilatory claims, not colorable ones.
>
> "We are mystified by the District Court's finding of frivolousness in this case." (Slip Opinion, p. 16)

Thus the Panel Opinion found that Appellant's double jeopardy claim was not only colorable but meritorious; that the District Court's finding of frivolity was clearly erroneous; and that the district court thus should have been deprived of jurisdiction to proceed with the trial. But because the panel interpreted *Dunbar* to make the finding of frivolity unreviewable, the panel held that the matter has ended there, and that petitioner was not entitled to relief.

The Supreme Court in *Abney* suggested that the problem of frivolous and dilatory appeals could be dealt with *at the Court of Appeals level, not by the trial court. Dunbar* required prompt written findings by the trial court, presumably to be reviewed by the appellate court. But the interpretations given *Abney* and *Dunbar* by the Panel Opinion in the instant case, and the procedures thus imposed, have served in the instant case, and will serve in the future, to emasculate the holding of *Abney*.

CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari and thereafter hold:

(1) That Petitioner's trial on the substantive count was barred by the Double Jeopardy Clause, or that it should be tried alone, without the constitutionally barred evidence;

(2) That the district court was deprived of jurisdiction to try Petitioner by reason of his non-frivolous interlocutory appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dick DeGuerin, a member of the Bar of this Court, certify that two copies of the Petition for Writ of Certiorari have been furnished to the United States Attorney for the Southern District of Texas and three copies have been furnished to the Solicitor General of the United States by certified mail, return receipt requested, on the _____ day of November, 1982.

DICK DEGUERIN